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ABSTRACT

The theoretical constructs underlying legislative approaches to at-risk student statutes are examined in this paper, with attention given to the ways in which educational institutions make certain factors significant to student success. Legislative approaches closely follow the epidemiology model, which attempts to identify, predict, and immunize future dropouts; the impact of school structure on student achievement is rarely considered. Part 1 explores recent federal and state legislative definitions of at-risk students, grouping these definitions into functional categories. Part 2 offers a legal analysis of the different types of definitions. Beginning with an overview of the history of at-risk programs, part 3 examines the various educational constructs underlying different programs. Part 4 investigates the social construction of reality implicit in these definitions and speculates on the consequences of this view of education. The last part, an analysis of legislative trends, offers recommendations for improvement and redefines the legislature's role in the development of a more just and effective public educational system. Two figures are included. (152 notes) (LMI)

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"At-Risk" Statutes: An Examination of Theoretical Constructs Underlying Legislative Approaches to Deviance in the Public Schools

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Table of Contents

Introduction

I. Legislative Approaches to At-Risk Students

A. Federal Definition

B. State Definitions

II. Legal Constructs Underlying "At-Risk" Statutes

A. Suspect Classifications

B. Non-Suspect Classifications

C. Individualized Diagnosis

D. Inadequacy of Current Legal Constructs

III. Educational Constructs Underlying for Programs for At-Risk Students

A. Remedial Paradigm

B. Compensatory Paradigm

C. Bridge Paradigm

D. Inadequacy of Current Educational Constructs

IV. Social Construction of Reality Underlying "At-Risk" Statutes

V. Trends and Legislative Options

Appendix A

State Definitions of At-Risk Students

Introduction

The chorus of concern over the state of public education in the United States grew to a clamour in the 1980s. Beginning with the National Commission on Excellence in Education report "A Nation at Risk"[1] in 1983, the public's attention has been directed toward improving the faltering public school system in the United States. This focus intensified with the election of George Bush, the self-styled "education president."

Much of this attention is directed toward the children who fail in the school system. Many teenagers still drop out of school,[2] and those that do graduate are not even necessarily literate.[3] When these students enter the job market, they find

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[1] National Commission on Excellence in Education, A Nation at Risk: The Imperative for Educational Reform (1983) [hereinafter NCEE, A Nation at Risk].

[2] Although the popular press tends to refer to record numbers of dropouts, in fact dropout rates are declining. According to U.S. Bureau of Census data, the overall dropout rate of 6.2 percent in 1980 had fallen to 4.8 percent in 1987. National Center for Education Statistics, The Condition of Education 1990 20, Vol. 1 Elementary and Secondary Education (1990) [hereinafter NCES, The Condition of Education]. The decrease in the dropout rate is most dramatic among minority students. Dropout rates for the same period declined from 5.7 percent to 4.6 percent for Caucasian students, from 9.2 percent to 6.7 percent for African-American students, and from 11.1 percent to 9.5 percent for Hispanic students of any race. Id.

[3] Illiterate high school graduates have brought suit against the schools that failed to educate them. These plaintiffs have lost because of an inability to show that the school had a duty of care, that there was a legally cognizable injury, and that their illiteracy was proximately caused by an action of the school. See Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440, 391 N.E.2d 352, 418 N.Y.S.2d 375 (1979); Peter W. v. San Francisco Unified School District, 60 Cal.App.3d 814, 131 Cal.Rptr. 854 (1976).

they are unprepared to function successfully in the majority of today's business situations.[4]

These unsuccessful students come disproportionately from groups with certain demographic characteristics such as minority ethnic background and low socioeconomic status.[5] Demographic projections show the ethnic and racial diversity of the United States increasing over the next decades, which presents important issues for an educational system that has been only marginally effective in serving diverse populations of students.[6]

Educational research indicates that in the education of these failing students, as well as their more successful peers, the first few years are crucial.[7] Educators stress the importance

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[4] See D.R. Moore and S. Davenport, The New Improved Sorting Machine (Paper presented at the Education Writers Asociation meeting, New Orleans, 1988 p.2) (in a typical Chicago high school, 53% of the graduating class did not have the basic skills needed to obtain future-oriented employment).

[5] Dropouts are disproportionately from the following categories: male, older, racial or ethnic minority, urban, low income, single parent family, and low level of parental education. Strother, Dropping Out, 68(4) Phi Delta Kappan 325, 326 (1986).

[6] H.L. Hodgkinson, All One System: Demographics of Education, Kindergarten Through Graduate School (1985) (projecting increase in number of student from poor, single-parent, and minority background).

[7] See, e.g., D. Hamburg, Fundamental Building Blocks of Early Life 3 (1987); Schweinhart & Weikart, Early Childhood Development Programs: A Public Investment Opportunity, Educ. Leadership 5 (1986); Becker & Gersten, A Follow-Up of Follow Through: The Later Effects of a Direct Instructional Model on Children in Fifth and Sixth Grades, 19 Am. Educ. Research J. 75 (1982); Darlington, The Consortium for Longtitudinal Studies, 3 Educ. Evaluation & Policy Analysis 37 (1981).

of the first years of a child's education.[8] For several decades, programs such as Head Start[9] have aimed to improve educational opportunities for some children.[10] As more children attend preschool and kindergarten,[11] early childhood education has become a high priority in educational systems in many states.

In an attempt to reduce the number of students that ultimately are unsuccessful in school, school districts, states, and even the federal government have been trying to direct early

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[8] This emphasis on early education has spawned the Core Knowledge Series, edited by E.D. Hirsch, Jr., which recommends that parents spend twenty minutes each school day working through these books of basic facts and information with their children. See, e.g., E. Hirsch, What Your First Grader Needs to Know: Fundamentals of a Good First Grade Education (1991). But research shows that the quality of the preschool education is essential. Katz, Engaging Children's Minds: The Implications of Research for Early Childhood Education, in C. Warger, A Resource Guide to Public School Early Childhood Programs (1988). David Elkind describes what he characterizes as an excessive concern with early childhood education and the potentially harmful effects of that concern in Miseducation: Preschoolers at Risk (1987) [hereinafter D. Elkind, Miseducation].

[9] Head Start is a preschool program financed by the federal government designed primarily for low socioeconomic status children.

[10] Head Start has the resources to provide services to only 20 percent of the eligible students. Edelman, What Can We Do 315 (1989) in J. Allen and J. Mason, eds., Risk Makers, Risk Takers, Risk Breakers: Reducing the Risks for Young Literacy Learners (1989) [hereinafter J. Allen, Risk Makers].

[11] From 1972 to 1986, the percentage of three- and four-year-olds in prekindergarten rose from 16.5 percent to 33.5 percent for Caucasian students and 16.2 percent to 27.1 percent for African-American students. The percentage of five-year-olds in kindergarten rose during the same period from 74.1 percent to 80.4 percent for Caucasian students and 67.1 percent to 82.1 percent for African-American students. NCES, The Condition of Education, supra note 2, at 54. See also D. Elkind, Miseducation, supra note 8, at 5.

childhood educational programs toward children deemed to be "at-risk" of future academic failure. A recent increase of legislation passed on the state and national level concerning at-risk students reflects a clear concern for faltering students. The statutes contain widely varying definitions and methods of identifying at-risk students. While the legislation is well-intentioned, this article contends that the ultimate impact of many of the definitions and resulting programs is detrimental to the elementary school children they seek to assist.

The "at-risk" terminology has its roots in epidemiology.[12] Physicians use statistical techniques to identify populations at-risk of contracting certain diseases. Based on these predictions, they then innoculate special groups against the disease. In determining who to vaccinate, the inconvenience and danger of the vaccination are balanced against the increased level of protection against the disease.

In an educational context, the metaphor has its limits. Statistics are of limited value in predicting future school performance, especially with young students.[13] The special programs, or vaccinations, given to identified children are not

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[12] For an interesting reflection on the power of medical metaphors, see S. Sontag, AIDS and Its Metaphors (1989).

[13] See infra text and notes 77-81. The Arizona Department of Education has conducted some statistical analyses to determine the relative accuracy in predicting student achievement of various factors typically used to identify at-risk students. Overall, the four-factor model produced an adjusted R^2 of under .40, and thus accounted for less than 40% of the variation in student test scores. The "At Risk" Status of Arizona School Districts 1, 6, Ed.Stat (Feb. 1989).

completely effective in helping those children.[14] Further, the risks involved in the identification of young children, such as the danger of stigmatization, are great.[15]

In epidemiology, it is usually far easier and perhaps more effective to immunize identified populations than to change the environmental and structural factors that create the risk. Too heavy reliance on this metaphor can lead educators to overlook the educational structures that place certain children at risk of failure. In addressing the issue of at-risk students, it is crucial to reconsider how educational institutions have contructed their environments in a way that makes certain factors significant to the success of students.[16] This article contends that the legislative approaches to at-risk students, however, tend to follow closely the epidemiology model, and rarely consider the impact of the structure of schools.

Part I explores recent federal and state legislative definitions of at-risk students, grouping these definitions into

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[14] Some Head Start programs, for example the High/Scope Perry Preschool Project in Ypsilanti, Michigan, do show positive effects over the course of the students' academic careers. Schweinhart, Weikart, & Larner, A Report on the High/Scope Preschool Curriculum Comparison Study: Consequences of Three Preschool Models Through Age 15, 1 Early Childhood Research Q. 15 (1986). See generally T. Nazario, In Defense of Children 111 (1988).

[15] See infra text and notes 74-75.

[16] The factors influencing the progress of students are in large part determined by educational policy and administrative decisionmaking. See also M. Minow, Making All the Difference: Inclusion, Exclusion, and American Law 23 (1990) (describing social contruction of difference) [hereinafter Minow, Making All the Difference].

functional categories.[17] Part II then proceeds with a legal analysis of the different types of definitions.[18] Beginning with an overview of the history of programs for at-risk students, Part III examines the various educational constructs underlying different programs for at-risk students.[19] Part IV examines the social construction of reality implicit in these definitions, and examines the consequences of this view of education.[20] Finally, Part V concludes with an examination of legislative trends, offering possibilities for improvements in the legislative approach, and describing a redefined role for the legislature in developing a more just and effective public educational system.[21]

I. Legislative Approaches to At-Risk Students

Reflecting a range of views about the nature of the problem, recent state and federal legislation concerning at-risk students serves to channel funds into programs for at-risk students. Some laws define at-risk students or methods to identify such students, whereas other laws leave the issues of definition and

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[17] See infra text accompanying notes 22-44.

[18] See infra text accompanying notes 45-116.

[19] See infra text accompanying notes 117-30.

[20] See infra text accompanying notes 131-46.

[21] See infra text accompanying notes 147-52.

identification to local discretion.[22]

Beginning in 1986, Congress passed legislation that included funding for research on at-risk students and teacher training in working with such students as high priorities in educational funding.[23] That trend increased in 1988.[24] Thus, while Congress hesitates to get very involved in the state educational systems, it wields the "power of the purse" to stress the problems of at-risk students.[25]

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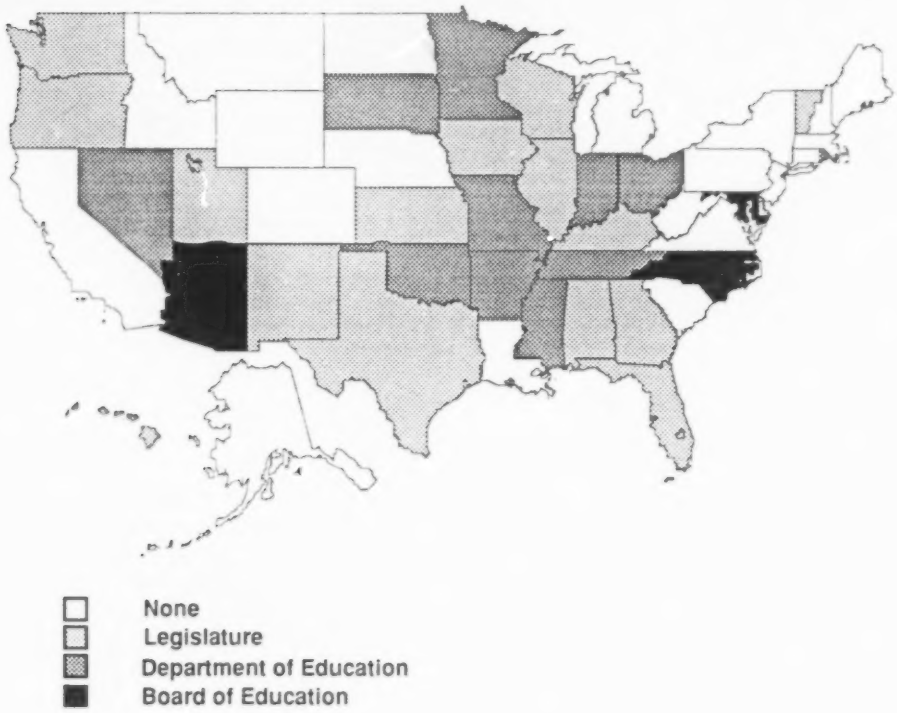
[22] Some legislatures have chosen to avoid the difficult task of determining which children should be classified as "at-risk." The problematic nature of this task is illustrated by a National Center for Educational Statistics estimate that nearly half of all children have one or more problem that puts them "at-risk" and a statement issued by a coalition of eleven educational organizations that emphasized that as many as one-third of U.S. public school students are at-risk because of factors such as "race, poverty, single-parent families, or limited English proficiency." Coalition of Educators Urges Wider Efforts for "At Risk" Youths, Education Week, June 10, 1987.

[23] 20 U.S.C. 1101 (1988) (a purpose of the Educator Recruitment, Retention, and Development subsection of the Higher Education Act of 1965 is to "promote university partnerships with local education agencies serving at-risk students . . .").

[24] 20 U.S.C. sec. 2763 (1988) (funds available for dropout prevention and reentry projects may be used for "effective programs for early intervention designed to identify at-risk students in elementary and early secondary schools . . ."); 20 U.S.C. sec. 2941 (1988) (local targeted assistance programs include "programs to meet the educational needs of students at risk of failure in school . . ."); 20 U.S.C. secs. 3242 and 5052 (1988) (School Dropout Demonstration Assistance Act of 1988 has a purpose of providing grants to establish and demonstrate "effective early intervention programs designed to identify at-risk students in elementary and secondary schools . . ."); 20 U.S.C. sec. 4843 (1988) (Fund for the Improvement and Reform of Schools and Teaching includes definition of "at-risk").

[25] In the context of special education, Martha Minow describes these grant-driven programs as "magnet labelling" because the financial incentives attract participants despite potentially harmful effects of the labelling. Minow, Making All the

Sources of Definitions of "At-Risk Students"



The states have also been responsive to concerns about unsuccessful students. In 1987, Indiana[26] and Oregon[27] were the first states to pass legislation concerning at-risk students. In 1988, Arizona[28] and Washington[29] also turned their attention to the issue, and by 1989 many other state legislatures addressed the problems of potentially faltering students.[30] The manners in which the different legislatures responded, however, varied widely.

A. Federal Definition

Congress promulgated a definition of at-risk students in 1988 that reads as follows:

> [T]he term "at risk" means students who, because of learning deficiencies, lack of school readiness, limited English proficiency, poverty, educational or

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Difference, supra note 16, at 37.

[26] Ind. Code Ann. sec. 20-10.1-18-4 (West 1980 and Supp.), as added by P.L. 390-1987(ss), SEC.26.

[27] 1987 Or. Laws Chapter 68[illegible] Sec. 1.

[28] Ariz. Rev. Stat. Ann. (1984 and Supp.) sec. 15-715. Laws 1988, ch. 308, sec. 3, as amended by Laws 1989, ch. 273, sec. 21, effective June 26, 1989.

[29] Wash. Rev. Code Ann. sec. 28A.34A.020 (1982 and Supp.).

[30] Iowa Code Ann. sec. 256A.3 (West 1988 and Supp.); Iowa Admin. Code 12.5(13), Ch. 12, p. 13; Me. Rev. Stat. Ann. tit. 20-A, sec. 4502(5)(L) (1983 and Supp.); N.M. Stat. Ann. sec. 22-13A-5 (1978 and Supp.); Tex. Educ. Code Ann. sec. 11.2052 (Vernon 1972 and Supp.) See generally Appendix A (chart of state definitions of at-risk students).

> economic disadvantage, or physical or emotional handicapping conditions face greater risk of low educational achievement and have greater potential of becoming school dropouts.[31]

Some elements of this definition, such as "learning deficiencies," "limited English proficiency," and perhaps "lack of school readiness," require specific evaluation of each child's performance. Other elements, such as "poverty," "educational or economic disadvantage," and "physical or emotional handicapping conditions," are based solely on demographic information about the child.

The framers of this definition appear to be addressing a variety of concerns in their approach to at-risk students. The link between a physically handicapping condition and low educational achievement is not self-evident,[32] although the assumption resembles the remedial concerns of educators who place children in lower academic tracks because of race. Poverty and economic disadvantage would be relevant to an educator concerned about environmental factors affecting academic achievement. Other factors that require individual diagnosis in reality do not predict future problems, but reflect current difficulties.

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[31] 20 U.S.C. sec. 4843 (1988).

[32] Nonetheless, educators have too often placed physically handicapped children of average or above average intelligence in special education programs for low ability students.

B. State Definitions[33]

Components of definitions for at-risk stuents fall into three categories: components regarding individual students, components addressing environmental factors, and components involving external standards.[34] Each category encompasses a broad range of factors. For example, individual components would include physical and neurological disorders, environmental factors would include socioeconomic status and language community, and external standards may address school achievement and physical health and growth.

The Council of Chief State School Officers has proposed a model state statute for at-risk students.[35] The Council suggests that:

> A child shall be deemed at risk of school failure and elibile to participate under Section A if:
> (a) he or she is a member of a household or family whose income is at or below the poverty level under criteria used by the Bureau of the Census in compiling the most recent decennial census, or
> (b) he or she is unable to speak or comprehend the English language.[36]

This recommended definition emphasizes environmental factors in

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[33] See generally Appendix A (chart of state definitions of at-risk students).

[34] Bowman, Early Intervention and the Public Schools, Paper presented to Council of Chief State School Officers (Boston 1988).

[35] Council of Chief State School Officers, Elements of a Model State Statute to Provide Educational Entitlements for At-Risk Students (1987).

[36] Id. at 5.

identifying at-risk students.

At least thirty states have a working definition of at-risk students. Almost all definitions address environmental concerns, usually in conjunction with child-centered and external standards components. Often the definitions involve immutable characteristics of students. An Oregon state statute specifies that "[p]rograms must target families whose children ages 0-8 are at-risk of experiencing difficulty in school based on the following criteria:" and includes amid a list of factors "[f]amilies with handicapped children as defined by ORS 343.227"[37] and "minority families."[38] This definition could be interpreted to signify that regardless of academic preparation and achievement, physically handicapped and minority students are innately less capable of succeeding in school.

The Iowa state statute also reflects some remedial concerns, but phrases the criteria in a manner that would seem to acknowledge the apparent inequity of identifying students on the basis of innate characteristics. The statute states that at-risk programs "shall accommodate students whose aspirations and achievement may be negatively affected by sterotypes [sic] linked to race, national origin, language background, gender, income,

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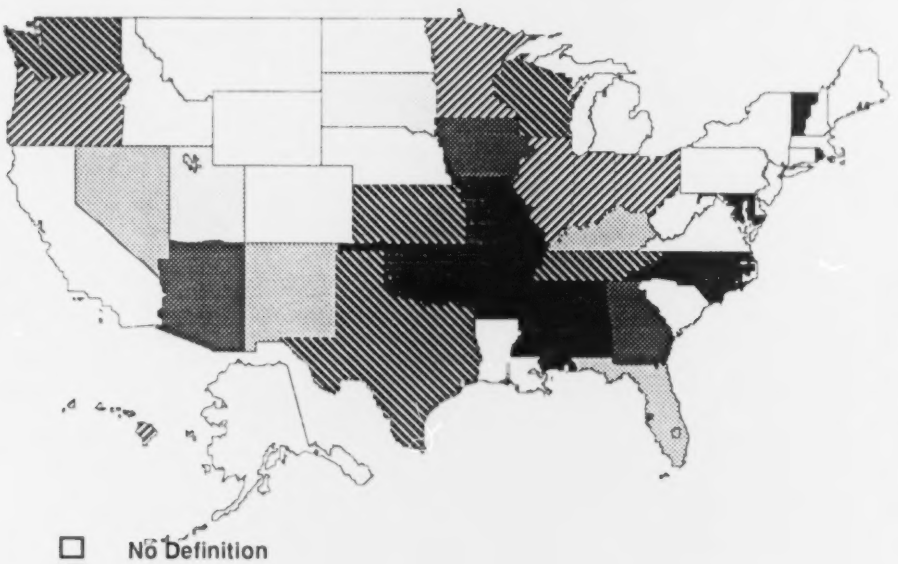
[37] 1987 Or. Laws Chapter 684 Sec. 1. ORS 343.227 in reality does not define "families with handicapped children," but references to characteristics such as "speech defects" make it clear that families with physically handicapped children fall within the definition.

[38] Id.

Basis of Characteristics in Definitions of "At Risk Students"



- No Definition
- Vague
- Child
- Environment
- Standards
- Child and Environment
- Child and Standards
- Environment and Standards
- Child and Environment and Standards

family status, and disability."[39] Although the rhetoric differs from the Oregon statute, the effect in some cases is still to place children in separate programs solely on the basis of race.[40]

Several states address the problem of racial separation and stigmatization in general. A Maryland Department of Education technical team report lists factors that alone or in conjunction with other factors may lead to a child being identified as at-risk and includes "Black or Hispanic" in the list.[41] Yet the report observes "Identifying children on the basis of their background characteristics has two potentially negative effects. On one hand, it could lead to stereotyping. On the other, it could result in the misidentification of a large number of children."[42] Perhaps because of concern over these negative effects, the Maryland Commission for Students at Risk report, based on the technical team report, takes a different approach.

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[39] Iowa Admin. Code 12.5(13), Ch. 12, p. 13.

[40] Community prejudice does not justify different treatment for racial minorities. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448 (1985) ("[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently..."). But see Lee v. Washington, 390 U.S. 333, 334 (1968) (Black, J., concurring) (racial segregation of inmates may be permissible for security reasons).

[41] Young Children Living in Risky Circumstances: Technical Team Report Addressing the Needs of At-Risk Students During the Early Learning Years 23, Report submitted to The Commission for Students At Risk of School Failure.

[42] Id.

The Commission asserts "Most efforts in the past have concentrated on trying to 'fix' the children. The Commission for Students at Risk believes the time is right to effect systemic change in style, climate, organization and curriculum in the children's schools."[43] Massachusetts statutes also shift the focus away from perceived problems in individual students and instead address "most-at-risk schools," or schools falling in the lowest quartile on standardized tests.[44] The Maryland and Massachusetts approaches provide a valuable exception to the majority of state definitions which identify and label students.

II. Legal Constructs Underlying "At-Risk" Statutes

State statutes identifying students as at-risk based on given criteria may face constitutional challenges. In analyzing the constitutionality of a statute under the equal protection clause of the fourteenth amendment, the courts first determine the interest involved. If the statute affects a fundamental right or categorizes people based on a suspect class, the court will scrutinize the statute far more closely. Supreme Court jurisprudence establishes three levels of scrutiny: strict

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[43] Maryland's Challenge: A Report of the Commission for Students at Risk 2 (Jan. 1990).

[44] Mass. Gen. Laws Ch. 14, secs. 49A-49E.

scrutiny, intermediate scrutiny, and rational basis scrutiny.[45] When a statute affects a fundamental right[46] or classifies on the basis of race or national origin the court will examine the statute with strict scrutiny. The court will uphold the statute only if it is necessary to achieve a compelling governmental interest[47] and is narrowly-tailored so that there is no less discriminatory alternative. If a statute categorizes people on

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[45] Nevertheless, several justices have questioned the correctness of tiered levels of scrutiny and have criticized the application of the standards. See, e.g., Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting).

[46] The Court has determined that education is not a fundamental rights under the federal Constitution. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 30-39, reh'g denied 411 U.S. 959 (1973). Some states recognize a fundamental right to education under state law. See Hubsch, Education and Self-Government: The Right to Education Under State Constitutional Law, 18 J. of Law & Ed. 93 (1989). Education is also considered to be a human right under international law. International Covenant on Economic, Social & Cultural Rights, Dec. 16, 1966, 993 UNTS 3, reprinted in 6 ILM 360 (1967) (entered into force Jan. 3, 1976), at Art. 13; Universal Declaration of Human Rights, GA Res. 217A(III), UN Doc. A/810 (1948), at Art. 26. This article will address equal protection analysis only as applied to suspect classifications.

[47] In Lyng v. Castillo, 106 S.Ct. 2727 (1986), the Supreme Court reiterated the criteria for a suspect classification. It must involve a group that historically has been subjected to discrimination, refer to an immutable characteristic, and apply to a group that is politically powerless or in the minority. Racial minorities fit this description in that historically they have faced widespread discrimination and have wielded little political power, and race is an immutable characteristic. The lack of political power is also seen in the school context. Although in major cities the majority of students are from minority racial groups, the majority of teachers, school administrators, and legislators, in other words the decision-makers, come from the racial majority. See also infra note 144.

the basis of gender, and perhaps illegitimacy,[48] the court will apply intermediate scrutiny and will uphold the statute if the classification is substantially related to an important governmental interest.[49] Finally, if a statute involves no fundamental rights or suspect classifications, the court will apply a rational basis standard and will uphold the statute unless the party challenging the statute can show that it is not rationally related to a legitimate state purpose.[50]

The legal analysis of "at-risk" statutes may be affected by the special legal status of schools and children.[51] The Court has been especially solicitous of student rights because of the importance of the educational context.[52] The Court also tends to

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[48] See generally L. Tribe, American Constitutional Law, 2d Ed. 1553-58 (1988) [hereinafter L. Tribe, American Constitutional Law] for a discussion of the constitutional status of illegitimacy. The Iowa statute includes "family status" as a criterion for identification, and the Indiana statute includes children "whose parents do not live together within the household." Iowa Admin. Code 12.5(13), Ch. 12, p. 13; Ind. Code Ann. sec. 20-10.1-18-4 sec. 4(b)(2).

[49] See Craig v. Boren, 429 U.S. 190 (1976).

[50] See United States R.R. Retirement Board v. Fritz, 449 U.S. 166 (1980); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[51] Children arguably could be considered a "discrete and insular minorit[y]" because they cannot vote, "a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

[52] See, e.g., Shelton v. Tucker, 364 U.S. 479, 489 (1960) ("The vigilant protection of Constitutional freedoms is nowhere more vital than in the community of American schools"); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) ("That

defer to expert opinion in matters regarding education, and thus educational, sociological, and psychological research may play an important role in the legal analysis.[53] The federal courts have been fairly aggressive in protecting the rights of minorities in the public schools.[54] It is likely that the courts would examine very carefully the "at-risk" statutes because of their impact on young schoolchildren.

A. Suspect Classifications

The constitutionality of the Oregon and Iowa statutes, as well as statutes of five other states which permit labelling and classification in part based on race,[55] is questionable.[56] To meet

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[teachers] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes").

[53] See, e.g., Brown v. Board of Educ., 347 U.S. 483, 494 n.11 (1954) (citing psychological and sociological research underlying decision to prohibit racially segregated schools).

[54] For example, courts can mandate an increase in local taxes to fund a program desegregating the public school system. Missouri v. Jenkins, 495 U.S. 33, 57 (1990); Griffin v. Prince Edward County School Bd., 377 U.S. 218, 233 (1964).

[55] Arkansas, Iowa, Maryland, Missouri, Oregon, Rhode Island, and Tennessee mention race as a factor in the identification process. The American Association of School Administrators also lists "ethnic/racial origins" as one of five major factors placing students at risk. American Association of School Administrators, Problems and Solutions, Paper No. 021-00213 (1989).

[56] Gunther has stated that the highest level of scrutiny is generally "´strict´ in theory and ´fatal´ in fact." Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a

the first component of the strict scrutiny test, the race-based "at-risk" statutes must be necessary to achieve a compelling interest of the legislature. Legislative history does not state explicitly the purpose of the statutes.[57] Still, given the historical context of concern over public education in which the statutes were developed,[58] it would be reasonable to infer that the statutes were intended to reduce the dropout rates in public schools and to improve the academic achievement of the least successful students. The stated purpose of several federal statutes is "to reduce the number of children who do not complete their elementary and secondary education . . .".[59] It is likely that a court would find this concern to be a compelling governmental interest and thus the statutes would meet the standard set by the first component of strict scrutiny.

To meet the second component of the strict scrutiny test, however, the state must show that the legislation in question is

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Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972). The last case to uphold a statute based on racial classification was Korematsu v. United States, 323 U.S. 214 (1944) (upholding military order leading to internment of West Coast citizens of Japanese ancestry during World War II). The decision has been widely condemned in subsequent years, and in 1988 Congress passed the Restitution for World War II Internment of Japanese-Americans and Aleuts Act, which allocated funds to pay damages to each citizen interned under the military order. Pub. L. No. 100-383, 102 Stat. 903 (codified at 50 App. sec. 1989).

[57] In contrast to cases of rational basis review, in the case of strict and intermediate level scrutiny, the Court will refuse to hypothesize additional legislative purposes. See generally L. Tribe, American Constitutional Law, supra note 48, at 1604-06.

[58] See supra text accompanying notes 1-11.

[59] 20 U.S.C. secs. 3242 and 5052 (1988 and Supp.).

the least restrictive means to protect the governmental interest in student success. In the case of "at-risk" statutes, the racial criteria used to identify students at risk of failure are both under- and over-inclusive. The criteria are under-inclusive in the sense that many students of the racial majority are ultimately unsuccessful in school.[60] Racial criteria are also over-inclusive in that they could identify students who are not in danger of school failure. Identified students would thus be burdened unfairly by the racial classification.[61] When individualized judgments are not feasible, racial classification based on legitimate data[62] may be constitutionally permissible.[63] Given, however, the prevalence of individual diagnosis in the public schools, it is not necessary to identify at-risk students

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[60] Still, the Supreme Court rarely invalidates a statute because it is under-inclusive. See generally L. Tribe, American Constitutional Law, supra note 48, at 1447 n.4. See also Railway Express Agency v. New York, 336 U.S. 106 (1949) (a statute that takes a step toward eliminating an existing evil does not violate the Equal Protection Clause even though it does not eliminate all the evil at once).

[61] See Note, Developments in the Law -- Equal Protection, 82 Harv. L. Rev. 1065, 1086 (1969) (arguing that over-inclusive statutes are worse that under-inclusive statutes because an unfairly applied burden is more unjust than an overlooked obligation).

[62] On the average, minority students often achieve at a lower level than majority students on commonly used evaluation instruments. For example, the National Assessment of Educational Progress quantifies the reading level of nine-year-olds as 217.7 for Caucasian students, 188.5 for African-American students, and 193.7 for Hispanic students. NCES, The Condition of Education, supra note 2, at 26.

[63] An example of such legislation might be a law requiring African-Americans to be tested for sickle-cell anemia.

based on demographic characteristics and thus generalize regarding the future success or failure of entire racial groups.[64]

Assuming that the programs provided for children identified as at-risk are a benefit, not a burden, racial minorities could be understood as privileged to be placed in such programs.[65] The rationale behind this argument is similar to that of affirmative action programs.[66] The Supreme Court, however, has held that affirmative action programs face the same level of scrutiny as other race-based classification schemes.[67] Thus, even affirmative action legislation will face a presumption of unconstitutionality when it is race-based. The jurisprudence of the Supreme Court

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[64] Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978) (holding on statutory grounds that female employees need not have higher pension salary deductions even though as a group they live longer).

[65] This argument seems a bit tenuous, given the extensive documentation of conditions in remedial tracks. A former Dean of the Stanford College of Education concluded, after a study including 38 schools and 27,000 individuals, that there were "marked contrasts between high and low track classes . . . . Differences in curricular content, pedagogy, and class climate favored the former . . . . Consistently, students of low economic status and from minorities were disproportionately represented . . . ." J Goodlad, A Place Called School 159 (1984). See generally Drowatzky, Tracking and Ability Grouping in Education, 10 J. of Law & Educ. 43 (1981) (general analysis of legal issues in tracking).

[66] The wording of the Iowa statute, in speaking of students "negatively affected by stereotypes linked to race . . .," reflects an affirmative action perspective.

[67] City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (with no proof of past discrimination by a state actor, government does not have compelling interest in Minority Business Utilization Plan designed to prevent discrimination by private firms).

would indicate that such legislation is valid only when it strives to correct clear past discrimination.[68] The "at-risk" statutes at issue instead address the disparate impact of existing educational programs on different groups of students. In fact some, like the Iowa statute, seek to compensate for the effects of generalized discrimination and stereotypes in society, not merely discrimination within the school system. Furthermore, the only race-based affirmative action programs in school settings that have been approved by the Court are programs that desegregate schools that in the past were intentionally segregated.[69] The race-based "at-risk" statutes, in contrast, serve to segregate students further[70] and impermissibly use race as a proxy for "at-risk."[71] Thus, the statutes are unlikely to be

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[68] The Court has required a showing of past discrimination in cases involving school desegregation and employment affirmative action programs. See generally L. Tribe, American Constitutional Law, supra note 48, at 1521-44.

[69] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) (school district may use busing or rezoning to remedy past intentional desegregation); North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971) (invalidating statute prohibiting race-based pupil assignments).

[70] See generally Bloomdahl, How Educational "Tracking" Railroads Minority Students, 9(2) Human Rights 10 (1980); see also Berry v. School Dist. of Benton Harbor, 442 F.Supp. 1280, 1294 (W.D.Mich. 1977) (assignment of African-American students to learning groups may constitute prima facie segregation). Martha Minow states that "[t]he dilemma for decision-makers--courts, states, employers--is how to help overcome past hostilities and degradation of people on the basis of group differences without employing and, in that sense, legitimating those very differences." M. Minow, Making All the Difference, supra note 16, at 47.

[71] A federal district court recently enjoined the City of Detroit from proceeding with all-male academies established within the public school system designed to address the needs of urban

upheld as examples of valid affirmative action legislation.

The judicial task remains, then, to determine if the statutes have a close means-end fit and thus pass strict scrutiny examination. Is a program that places students in a special program based in part on race a narrowly tailored means to remedy the disproportionately high level of school failure of racial minorities?[72] On the contrary, beginning with Brown v. Board of Education,[73] the Supreme Court has found that racial segregation in and of itself promotes a sense of inferiority among minority students that affects motivation to learn. The Court explained that segregation creates in African-American children "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone . . . [this] sense of inferiority . . . [affects] the motivation of a child to learn."[74] More recent cases indicate that the Court may view school administrators who permit racial segregation as

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males. Plaintiffs argued that "the male academies improperly use gender as a 'proxy for other, more germane bases of classification,' Craig v. Boren, 429 U.S. 190, 198 [] (1976), in this instance, for 'at-risk' students." Garrett v. Board of Educ. of School Dist. of Detroit, 775 F.Supp. 1004, 1007 (E.D.Mich. 1991). The court held that although the purpose of the academies was important, it did not outweigh the right to equal opportunity of female students. Id. at 1014.

[72] See supra note 2 for data illustrating the magnitude of the difference in dropout rates among Caucasian, African-American, and Hispanic students.

[73] 347 U.S. 483 (1954).

[74] Id. at 485, 494.

strengthening stigmatizing attitudes.[75] After Brown, courts have permitted segregation by ability, not by racial group.[76] The statutes we have considered, however, attempt to predict future performance based on race, not ability.

Legislators favoring race-based "at-risk" statutes may point to statistics that show disproportionately low levels of performance by minority students on standardized tests.[77] Courts, though, have not always accepted the validity of standardized tests in measuring the abilities of minority students.[78] Recent studies of test scores using statistical techniques such as factorial analysis and regression analysis show that

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[75] See Dayton Bd. of Educ. v. Brinkman, 443 U.S. 449 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 526 (1979).

[76] See, e.g., Stell v. Savannah-Chatham County Bd. of Educ., 333 F.2d 55, 61-62 (5th Cir. 1964); Borders v. Ripley, 247 F.2d 268, 271 (5th Cir. 1957).

[77] In 1983, the mean Scholastic Aptitute Test (SAT) score for Caucasians was 443 and for African-Americans was 339. D. Owen, None of the Above: Behind the Myth of Scholastic Aptitude 216 (1985). In 1988, the mean Composite American College Testing Assessment Test (ACT) score for Caucasians was 18.9 and for African-Americans was 13.6. American College Testing, Inc.

[78] Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984) (I.Q. tests not valid measure of intelligence for African-American students and thus may not be used for special education placement). C.f. Moses v. Washington Parish School Board, 330 F.Supp. 1340 (E.D.La 1971) aff'd 456 F.2d 1285 (5th Cir. 1972), per curiam, cert. denied 409 U.S. 1013 (1972) (testing for placement prohibited in recently desegregated school); Hobson v. Hansen, 269 F.Supp. 401 (D.C. Cir. 1967), aff'd sub nom Smuch v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (results of tests discarded because of racially-biased results). But see Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1419 (11th Cir. 1985) (upholding grouping based on standardized test scores despite lack of proof of efficacy and lack of validation for the tests); Quarles v. Oxford Municipal Separate School Dist., No. WC 69-62-K. Slip op. at 7 (N.D.Miss. 1988).

socioeconomic status is far more determinative than race.[79] Furthermore, many experts have criticized standardized tests as culturally biased and scaled by reference to a white, middle-class norm.[80] Finally, the Court has shown a wariness to rely solely on statistical information as a basis for race-based legislation.[81]

Not only are racial criteria for identification of at-risk students based on rather questionable standardized test data,[82] but the psychological effects and stigmatization of race-based classification mitigate against any material improvements in

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[79] When the data are controlled for other demographic variables, racial differences in test scores are dramatically reduced. Stepwise multiple regression analysis shows the importance of socioeconomic status in predicting test scores. See Chambers, All of America's Children, paper delivered at NASSP Annual Convention (1988) (statistical analysis of ACT scores of Hispanic students matched with similarly situated Caucasian students); A. Whitworth, A Comparison of ACT Assessment Scores for Similarly Situated Black and White Students, unpublished dissertation, University of Iowa (1987). The correlation between race and socioeconomic status is not surprising, given that the Bureau of Census calculates that the percentage of children under 18 living in poverty is 15 percent for Caucasians, 45.1 percent for African-Americans, and 39.3 percent for Hispanics. NCES, The Condition of Education, supra note 2, at 64.

[80] See, e.g., S. Gould, The Mismeasure of Man (1981); L. Kamin, The Science and Politics of I.Q. 5-6 (1974); Bersoff, Regarding Psychologists Testily: Legal Regulation of Psychological Assessment in Public Schools, 39 Md. L. Rev. 27, 51-58 (1979).

[81] Washington v. Davis, 426 U.S. 229 (1976) (disproportionate racial impact of written test of verbal and reading ability not enough to prove discriminatory intent in hiring police officers).

[82] See supra text accompanying notes 78-81.

student achievement as a result of the programs.[83] "At-risk" statutes are particularly insidious because it is difficult to rebut an identification that predicts future failure.[84] Too often, as a result of the identification teacher and student expectations are lowered, and thus poorer student performance validates the initial identification.[85] It is difficult to assert that the racially-based criteria are narrowly tailored to a compelling government interest, and therefore a court should invalidate the statutes.

B. Non-Suspect Classifications

Some "at-risk" statutes do not involve suspect classifications, but instead identify children on the basis of other factors. Such factors include economic factors[86] (income

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[83] The damaging effects of this type of classification are not entirely due to racial classification. See infra note 142. See generally E. Goode, Deviant Behavior, at 32-35 (2d ed. 1984).

[84] See Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264 (9th Cir. 1974) (distinguishing tracking system where classifications were "predictive" and isolated students of "less promising" ability).

[85] J. Oakes, Keeping Track: How Schools Structure Inequality (1985); L. Riccio, Literature Review of Ability Grouping, Memorandum to Jean Peelen, Chief of the Elementary and Secondary Education Branch, Policy and Enforcement Service, Office of Civil Rights, Department of Education (OCR) (Sept. 17, 1984); R. Rosenthal & L. Jacobson, Pygmalion in the Classroom (1968).

[86] Ariz. Rev. Stat. Ann. (1984 and Supp.) sec. 15-715. Laws 1988, ch. 308, sec. 3, as amended by Laws 1989, ch. 273, sec. 21; Ind. Code Ann. sec. 20-10.1-18-4 (West 1980 and Supp.), as added by P.L. 390-1987(ss), SEC.26.; N.M. Stat. Ann. sec. 22-13A-5 (1978 and Supp.); 1987 Or. Laws Chapter 684 Sec. 1.

below the poverty level);[87] family structure[88] (single, step, and dual career families);[89] adolescent parents;[90] bilingual background;[91] high mobility;[92] and disruptive family environment (prison, chemical abuse).[93] Since these classifications do not categorize on the basis of race or national origin and thus are not suspect, a court would not automatically apply strict scrutiny in analyzing the constitutionality of the statutes.

It can be argued that many of the above classifications contain a disproportionately high number of families of minority racial groups,[94] and thus in reality should receive strict scrutiny. Washington v. Davis,[95] however, established that a discriminatory impact is not sufficient to invalidate a statute under the Equal Protection Clause but that a discriminatory

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[87] Ind. Code Ann. sec. 20-10.1-18-4.

[88] Iowa Code Ann. sec. 256A.3 (West 1988 and Supp.).

[89] 1987 Or. Laws Chapter 684 Sec. 1.

[90] Id.

[91] N.M. Stat. Ann. sec. 22-13A-5 (1978 and Supp.).

[92] 1987 Or. Laws Chapter 684 Sec. 1.

[93] Id.

[94] For example, the U.S. Bureau of the Census reports that in 1987, 10.5 percent of all Caucasians and 33.1 percent of all African-Americans lived below the poverty level. The World Almanac and Book of Facts 561 (1990). It also states that in 1986, 73.5 percent of all Caucasians and 47.0 of all African-Americans lived in "married-couple families." Id. at 563.

[95] 426 U.S. 229 (1976).

intent is necessary.[96] Under rational basis review, the statutes need only be rationally related to a legitimate governmental purpose.[97] Presumably the improvement of public education and the reduction of dropout rates are legitimate purposes, and the "at-risk" programs could be rationally related to those purposes. Consequently, under rational basis review the statutes would be considered constitutional.

A stronger challenge to "at-risk" statutes involving non-suspect classifications would be under Title VI of the Civil Rights Act of 1964,[98] which prohibits discrimination in programs that receive federal funds.[99] The standard of proof in a Title VI claim is not clear.[100] In 1974, the Court held that proof of

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[96] But see Sullivan, The Intent Requirement in Desegregation Cases: The Inapplicability of Washington v. Davis, 10(3) J. of Law and Educ. 325 (1981) (arguing against intent requirement in desegregation cases because "the injury is the stigma of racial isolation itself" and because the government has the ultimate responsibility for education). Id. at 330. See also Lawrence, The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1987) (criticizing intent requirement).

[97] See supra note 50 and accompanying text.

[98] Pub. L. No. 88-352, sec. 72, 78 Stat. 241, 255 (1964 (codified at 42 U.S.C. sec. 2000d (1988)).

[99] "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. sec. 2000d (1988).

[100] See generally Note, Getting Back on Track: Challenging Racially Discriminatory Effects of Educational Tracking, 20 Colum. J.L. & Soc. Probs. 283, 301-306 (1986).

discriminatory effect violates Title VI.[101] In Regents of the University of California v. Bakke,[102] however, the Court stated that Title VI was coextensive with the fourteenth amendment.[103] Since Washington v. Davis held that a showing of intent is needed for a fourteenth amendment claim,[104] it seems that intent is required for a Title VI claim. Yet in a 1983 plurality opinion,[105] the Court divided on whether Bakke overruled the 1974 opinion, and a majority stated that it would uphold a discriminatory effect challenge if it were brought under Section 1983 to enforce Title VI.[106] Thus, while it may be difficult to challenge statutes based on non-suspect classifications under the equal protection clause, a Section 1983 claim enforcing Title VI may invalidate the statutes on the basis of their disparate impact on minority students.

"At-risk" statutes based on non-suspect classifications may also be challenged under the due process clause. Since education is not a fundamental right under the federal Constitution,[107] the

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[101] Lau v. Nichols, 414 U.S. 563, 568 (1974) ("Discrimination is barred which has that effect even though no purposeful design is present." (emphasis in original)).

[102] 438 U.S. 265 (1978).

[103] Id. at 287.

[104] 426 U.S 229, 229 (1976).

[105] Guardians Association v. Civil Service Commission, 463 U.S. 582 (1983).

[106] Id. at 590, 643-45.

[107] See supra note 46.

statutes may not be invalidated under substantive due process, but procedural due process analysis may provide an interesting challenge. The Education for All Handicapped Children Act[108] provides procedural safeguards for children labelled and placed in special education programs and grew out of legal challenges to earlier classification procedures.[109] Children placed in "at-risk" programs may be entitled to the same procedural due process protection.

C. Individualized Diagnosis

Other "at-risk" statutes use criteria that properly do not belong in the category of predictive devices, since, in fact, the criteria are indicators of substandard past performance. These criteria include the child's level of development,[110] academic factors,[111] high absenteeism,[112] and a diagnosis of being developmentally at-risk.[113] These factors require individual

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[108] 20 U.S.C. secs. 1400-85 (1989).

[109] See, e.g., Pennsylvania Assoc. for Retarded Children (PARC) v. Commonwealth, 334 F. Supp 1257 (E.D.Pa. 1972) (developmentally disabled children entitled to free, public education, in regular classroom whenever possible, and procedural due process to determine placement); Mills v. Board of Educ. of Dist. of Columbia, 348 F.Supp. 866 (D.D.C. 1972) (all handicapped children are entitled to rights established in PARC decision).

[110] Iowa Code Ann. sec. 256A.3 (West 1988 and Supp.).

[111] Ariz. Rev. Stat. Ann. (1984 and Supp.) sec. 15-715.

[112] 1987 Or. Laws Chapter 684 Sec. 1.

[113] Id.

evaluation of each student, and thus are quite different in effect from other factors which identify and classify students without regard to the individual except in determining certain demographic characteristics. They indicate children who are already failing, not just children who may be at-risk of future failure.

D. Inadequacy of Current Legal Constructs

The foregoing legal analysis of necessity focuses on the individual. Equal protection analysis requires the classification of individuals and the examination of potentially discriminatory intent of the state actor. It is not a tool that easily can be used to examine systemic mechanisms and problems.[114] Similarly, procedural due process may protect individual students against irrational classification, but it does not address the reasons for classification in the public schools. The legal analysis of "at-risk" statutes parallels the analysis of school desegregation in that it centers around individual intent[115] and the analysis of special education in its focus on consistency.[116] Existing legal constructs are utterly inadequate to examine the institutional and educational impact of the "at-risk" statutes.

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[114] Peter Senge addresses the importance of systemic thinking in examining contemporary societal problems in P. Senge, The Fifth Discipline: The Art and Practice of the Learning Organization (1990).

[115] See supra note 68 and accompanying text.

[116] See supra note 109 and accompanying text.

III. Educational Constructs Underlying Programs for At-Risk Students

While the term "at-risk" is relatively new,[117] the concept of educational programs directed toward disadvantaged students has a longer history. In general, these programs can be grouped into categories corresponding to three paradigms: the remedial paradigm, the compensatory paradigm, and the bridge paradigm.[118] It is important to examine the mutually exclusive assumptions used to form the basis for these classifications about the nature

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[117] Related terms used over the years to describe at-risk students include: alienated, culturally deprived, disadvantanged, disenfranchised, dropout, ghetto, impoverished, language-impaired, learning disabled, low-achieving, low-income, low-performing, marginal, remedial, underprivileged, and urban. B. Presseisen, Teaching Thinking and At-Risk Students: Defining a Population, in B. Presseisen, At-Risk Students and Thinking: Perspectives from Research 11 (WDC, National Educational Association 1988) [hereinafter Presseisen, Defining a Population]. First uses of the term "at-risk" include NCEE, A Nation at Risk, supra note 1; National Coalition of Advocates for Students, Barriers to Excellence: Our Children at Risk (Boston, NCAS 1985); E.L. McDill, G. Natriello, and A.M. Pallas, A Population at Risk: Potential Consequences of Tougher School Standards for Student Dropouts, 94(2) American Journal of Education 135 (1986).

[118] H.P. Ginsburg, The Myth of the Deprived Child: Poor Children's Intellect and Education, in U. Neisser, ed., The School Achievement of Minority Children: New Perspectives 169 (1986); J.A. Banks, Educating Minority Youths: An Inventory of Current Theory, 15(1) Education and Urban Society 88 (1982).

of educational problems and diverse populations of students.[119]

A. Remedial Paradigm

The first category of programs consists of intervention programs designed to develop basic academic and social skills in low-achieving students. Beginning in the 1960s, these programs relied heavily on grouping students of similar ability and channeling students into tracks commensurate with their ability. The primary goal was to bring students to a minimal level of competency.

Programs of remediation blame low academic achievement on cognitive deficiencies in the unsuccessful student.[120] The disproportionate identification of poor and minority children as in need of remediation was explained by the genetic inferiority of the lower classes and nondominant ethnic groups.[121] The de

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[119] For a roughly analogous analysis of conceptual approaches to the mentally retarded, see Minow, When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference, 22 Harv. C.R.-C.L. Rev. 111 (1987) [hereinafter Minow, When Difference Has Its Home]. Larry Cuban mentions a similar framework in Cuban, The "At-Risk" Label and the Problem of Urban School Reform, 70(10) Phi Delta Kappan 780, 781 (1989) [hereinafter Cuban, The "At-Risk" Label].

[120] In this regard, the perspective of remedial programs resembles that of "at-risk" definitions using factors addressing the individual student. See supra text accompanying note 34.

[121] This assertion was supported by social scientist Arthur Jensen. See Jensen, Compensatory Education and the Theory of Intelligence, 66(8) Phi Delta Kappan 554 (1985); Jensen, Obstacles, Problems, and Pitfalls in Differential Psychology, in S. Scarr, ed., Race, Social Class, and Individual Differences in I.Q. (1981); A. Jensen, Genetics and Education (1972); Jensen,

facto racial segregation that resulted from disproportionate identification was explained by proponents of the remedial programs as based not on discrimination, but on a realistic acknowledgement of the inherent abilities of different racial groups.[122]

B. Compensatory Paradigm

The second type of program, also begun in the 1960s, was designed to compensate for environments lacking in intellectual stimulation. Programs of this model include Head Start, Follow Through, Upward Bound, and Project Literacy.[123] Their purpose was to provide an academically rich environment that through intensive and systematic instruction would help children overcome the disadvantages of early childhood years spent in less stimulating environments.[124] These programs strived to integrate children into a mainstream education;[125] thus, proponents of

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How Much Can We Boost IQ and Scholastic Achievement?, 39(1) Harvard Educational Review 1 (1969).

[122] This view of at-risk students roughly parallels Minow's description of the "Abnormal Persons" approach to the mentally ill. Minow, When Difference Has Its Home, supra note 111, at 120-22.

[123] Presseisen, Defining a Population, supra note 109, at 27.

[124] See B. Bloom, A. Davis, and R. Hess, Compensatory Education for Cultural Deprivation (1965).

[125] Courts recognize the low probability of switching academic tracks and succeeding in a compensatory program. See United States v. Gadsden County School Dist., 572 F.2d 1049 (5th Cir. 1978); Hobson v. Hansen, 269 F.Supp. 401 (D.C. Cir. 1967), aff'd

compensatory programs also fought for the desegregation of the school system.

This second category of programs blames low academic achievement on environments lacking appropriate stimulation.[126] Low achieving children were understood to be culturally deprived and thus had problems adapting to the culturally rich school environment. If intervention could be initiated early enough, before the home environment damaged the child, academic success could be achieved.[127]

C. Bridge Paradigm

Both the remedial and compensatory paradigm take the school environment as given and work at adapting the student to the school. The bridge paradigm, however, which emerged in the early 1970s, viewed both the school and the student as capable of

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sub nom. Smuch v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[126] A recent example of this manner of thinking is Levin, New Schools for the Disadvantaged, Paper prepared for the Mid-Continent Regional Educational Laboratory (1987) (proposing a program to bring "disadvantaged" students "into the educational mainstream" and help them overcome a "lack [of] experiences and resources that assure success in most conventional schools"). In this regard, the perspective of compensatory programs resembles that of "at-risk" definitions using factors addressing environmental factors. See supra text accompanying note 34.

[127] This view of at-risk students parallels Minow's rights analysis approach to the mentally retarded. The rights analysis approach assumes that everyone has the same rights, but that some groups have special rights that are necessary to compensate for past denials of rights. Minow, When Difference Has Its Home, supra note 111, at 122-27.

adaptation and adjustment. Programs of this model were designed to help students and educational institutions adjust to a culturally pluralistic society. The purpose of the programs was to bridge the gap between the culture of many low achieving students and the culture of the school, which was almost exclusively based on white, middle-class culture. Multicultural education and bilingual educational exemplify programs in which both the students and the institution adapt in order to address a need.

These programs blame low achievement on schools that are insensitive to the cultural backgrounds of unsuccessful students.[128] Acceptance of students' learning styles, lifestyles, and values as legitimate underlies this model. Educators work to synthesize the styles of the students and the school, and assume that academic success is possible for all students only when

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[128] See G. Gay, Cultural Differences Important in Education of Black Children, 6(3) Momentum 30 (1975). Larry Cuban distinguishes two aspects of the insensitivity of the schools:

> - Children often fail because the culture of the school ignores or degrades their family and community background. Middle-class teachers, reflecting the school's values, single out for criticism differences in children's behavior and values; the crush the self-esteem of students and neglect the strengths that these students bring to school.
> - The structure of the school is not flexible enough to accommodate the diverse abilities and interests of a heterogeneous student body. Programs are seldom adapted to children's individual differences. Instead, schools seek uniformity, and departures from the norm in achievement and behavior are defined as problems. Social, racial, and ethnic discrimination are embedded in the routine practices of schools and districts.'

Cuban, The "At-Risk" Label, supra note 111, at 781.

educators work to bridge the cultural gap[129] between the public school system and many students.[130]

D. Inadequacy of Current Educational Constructs

The remedial and compensatory paradigms suffer the same flaw as current legal constructs for examining "at-risk" statutes: they focus on the individual and overlook systemic factors influencing the effectiveness of the public school system. The bridge paradigm moves closer toward a systems perspective, but tends to posit the school culture as relatively immutable and thus focuses on promoting adjustment to the difference between school and home cultures. A systems perspective permits a broader view of mechanisms affecting the impact of public school education on the nation's children. Through reexamining from a systems perspective the legal and educational constructs underlying the "at-risk" statutes, we can work toward developing new and more effective ways of meeting the needs of public school students.

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[129] For a description of the impact of this cultural gap, see Fordham, Racelessness as a Factor in Black Students' School Success: Pragmatic Strategy or Pyrrhic Victory?, 58(1) Harv. Ed. Rev. 54 (1988). But see Hawkins, Racelessness, Collectivity, and Individuality in the Black Community, 58(3) Harv. Ed. Rev. 420 (1988) (critique of Fordham article).

[130] This view is similar to Minow's social relations approach in its emphasis on interaction between groups and the perspectives and power relationships involved in those interactions. Minow, When Difference Has Its Home, supra note 111, at 127-30.

IV. Social Construction of Reality Underlying "At-Risk" Statutes

Instead of merely recognizing the inadequacy of existing legislation, it is important to analyze the social contruction of reality[131] that fostered the legislation.[132] Such analysis is necessary in order to conceive of better ways legislatively to support and structure schools that currently are faltering in their task of educating all students.[133] Overall, the vision of education influencing legislatures is institution-centered and conformist, and thus rejects and attempts to reform students who do not fit the institutional mold.[134]

Educators, taught appropriate structures for organizing educational programs and proper procedures for placing students within those programs,[135] tend to conform to and perpetuate

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[131] See generally, P. Berger and T. Luckmann, The Social Construction of Reality: A Treatise in the Sociology of Knowledge (1966).

[132] Examples of social construction analysis used in a legal context include C. Liachowitz, Disability as a Social Contruct: Legislative Roots (1988); Minow, When Difference Has Its Home, supra note 111.

[133] Critics argue that legislation only reflects the beliefs of the populace. For an argument by a respected scholar in the field of sociology that in the United States, legislation precedes community folkways, see G. Allport, The Nature of Prejudice 437-40 (1958).

[134] See infra text accompanying notes 135-46.

[135] A good example comes from R. Campbell, Introduction to Educational Administration 11 (1983) ("much of the job of an educational administrator involves the mundane work of making a bureaucracy work") (citing March, American Public School

institution-centered identification procedures. They evaluate students in terms of their "readiness"[136] for the school program[137] and quantify their knowledge and abilities[138] at a specific preformulated grade level.[139] Abilities that do not appear on the list of skills learned at a particular level are ignored.[140] Students are measured against and must adapt to the institutional structure.

Furthermore, schools operate under the working assumption that all students develop in a parallel manner. Evaluation systems usually compare students to each other rather than

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Administration: A Short Analysis, 86 School Review 223 (1978)). Note the language of the mass production used in another popular textbook: "This book is about educational administration and its contributions to the efficient and effective delivery of educational services . . . ." S. Knezevich, Administration of Public Education 3 (1984).

[136] See 20 U.S.C. sec. 4843 (1988); Mich Stat. Ann. sec. 15.1919(936) - 15.1919(938).

[137] Researchers studying early literacy development have challenged the concept of readiness as a sort of threshold test. See Mason and Allen, A Review of Emergent Literacy with Implications for Research and Practice in Reading, in E. Rothkopf, ed., 13 Review of Research in Education (1986); W. Teale & E. Sulzby, eds., Emergent Literacy: Writing and Reading (1986).

[138] In this view, all elements must be quantified, and those that cannot be quantified are overlooked. See B. Tuckman, Evaluating Instructional Programs 14 (1985).

[139] For example, the Iowa Test of Basic Skills assigns students a score to the nearest tenth of a grade level.

[140] An exception to this system would be some programs for talented and gifted students, although often students must have high standardized test scores in order to qualify for the program.

analyze an individual student's growth and progress.[141] Standardized tests are normed; students at the low end of the curve are placed in remedial programs to bring their scores up to the mean.[142] Students with different learning styles or speeds often do poorer than their peers, and their "low academic achievement" is a red herring in a system that works to bring all students to the same level. Here again, the focus is on the needs of the institution, not on the needs of the individual students.

From this perspective, the defining of students at-risk of failure is an assertion of power over those students. Sociologists view deviance as a socially constructed phenomenon; a dominant social group defines a norm and those falling outside of the norm are labelled deviant.[143] In the context of the school, legislators or educators, who come overwhelmingly from dominant

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[141] For a general critique of this structure, see F. Smith, Insult to Intelligence: The Bureaucratic Invasion of Our Classrooms 129-68 (1986). This system of testing is predicated on what Bryant Fillion of Fordham University calls "information dumping" and what Paulo Freire terms a "banking concept of education." Id. at 138; P. Freire, Pedagogy of the Oppressed 57 (1970). Both refer to a static view of the educational process in which students are seen as empty vessels or accounts, and teachers deposit knowledge in students and then test to ensure that the knowledge is there.

[142] At this point, however, the stigmatizing effect of placement in remedial groups and lower teacher expectations often initiate a cycle of failure and the "at-risk" label is proven true. For an analogous analysis of a physical problem creating a social problem, see R. Scott, The Making of Blind Men: A Study of Adult Socialization (1969) ("a group of people who initially share in common only the fact that they have problems of vision . . . eventually come to feel and behave in patterned, predictable ways"). Id. at 120-21.

[143] See generally, H. Becker, Outsiders: Studies in the Sociology of Deviance 1-18 (1963); T. Parsons, The Social System 249-325 (1951).

social groups,[144] determine the standards for a child apt to succeed in school, and define all other children as deviant, or "at-risk."

The result of this institution-centered, conformist view of the educational process is to find fault with students that do not fit neatly into the system. The "at-risk" statutes blame the victim[145] rather than examine the institution.[146] If students from nonwhite, nonmiddle-class backgrounds are leaving school or performing poorly in disproportionate numbers, it would seem reasonable to inquire how the educational institutions can better serve all students rather than attempt to change large numbers of students to better fit a rigid institutional structure. Indeed, it is not surprising that observers consider the public schools to be in a state of crisis when the white, middle-class child tacitly posited as the norm is increasingly rare in the school

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[144] For example, although half of the educational administration graduate students are women, the pool of U.S. superintendents includes only 3 percent women, and the number of female principals has actually declined recently. National Commission on Excellence in Educational Administration, Leaders for America's Schools 28 (1987).

[145] See Carter, When Victims Happen To Be Black, 97 Yale L.J. 420, 435 (1988) for an interesting analysis of how the bilateral individualist conception of responsibility for one's actions denies the possibility of the victimization of a group of people.

[146] The editors of a recent collection of scholarship on at-risk students report the consensus of the group at a meeting of the Literacy Development in Young Children section of the International Reading Association: "We believed that children are not inherently `at-risk'; school systems put them at risk when they uniformly impose an inflexible curriculum and an invariable timetable for `success.'" J. Allen, Risk Makers, supra note 10, at xvii.

system. Schools need to determine their essential purpose and determine the most effective means to achieve that purpose given the characteristics of the students attending the schools. Instead, the "at-risk" statutes address difference by trying to eliminate it, and label students as being at-risk within the institution, rather than seeing the institution as being at-risk of failing in its mission.

V. Trends and Legislative Options

Legislative trends seem to be going further in the direction of quantifying and measuring student abilities to conform to the institution. The programs begun in the 1970s to bridge the gap between the school and home cultures of many students have in large part fallen victim to the accountability movement that demands that educational investment provide an immediate and readily visible return. Legislators face pressures from constituents to improve the rankings of their home states in the field of education, even at the cost of long-term effectiveness.[147] It would be a politically unpopular move to fail to support legislation for at-risk students, for the very focus of the construction signifies helping a child in danger.

Opportunities exist, however, for legislative support of

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[147] While in business the emphasis on the short-term bottom line appears to be waning, in education it is just beginning. See T. Peters and N. Austin, A Passion for Excellence 417 (1987) (criticizing a "bottom-line, short-term (overnight) focus" in business).

educational reforms that make institutions more responsive to student needs. Larry Cuban urges ungraded schools as a means to avoid labelling, segregating, and in the end eliminating students identified as at-risk.[148] While he insists that fundamental changes in the structure of the schools are necessary, he also points out that immediate improvements in programs for at-risk students could be made through reduced program size, committed staff, program flexibility, and community spirit.[149]

Cooperative learning programs provide another opportunity for legislators to support at-risk students. Cooperative learning techniques come easily to students from cultural background that deemphasize the individualistic, competitive norms of the white middle class.[150] In a classroom using a cooperative learning methodology, students work in groups sharing information and working together toward a common goal. The success or failure of each student rests on the success or failure of the group, and the methodology encourages students to assist each other rather than compete in an attempt to be better than their peers.

Whole language classrooms also benefit marginalized students by permitting teachers and students to work together in developing literacy skills regardless of the level of preparation

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[148] Cuban, The "At-Risk" Label, supra note 111.

[149] Id. at 799-800.

[150] See R. Slavin, Cooperative Learning (1983); D. Johnson, R. Johnson, E. Holubec, & P. Roy, Circles of Learning: Cooperation in the Classroom (1984).

and background knowledge of the student.[151] Students share the learning process, and students at any level of advancement are able to participate effectively and successfully in activities designed to encourage young readers and writers to communicate with each other.

"Just community" classrooms permit students to experience democracy within the school context and to shape institutions to meet their needs.[152] These classrooms, in which students take responsiblity for community decisions and priorities, give a voice to students, an experience all too rare in most schools. Disaffected students who perhaps feel outside the mainstream of school life can be assisted powerfully by the respect and empowerment that can come through alternative forms of classroom organization.

Ungraded schools, cooperative learning, whole language, and just community classrooms will not single-handedly save public school education. Yet, all these programs have been implemented in various districts over the years, often with high levels of success in a range of educational environments. They benefit not only students performing poorly in traditional school structures, but also students who deviate by surpassing existing norms. It

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[151] For a description of a whole language program in which teachers are able to adapt the literacy program to the individual needs of their students, see Henke, Beyond Basal Reading: A District's Commitment to Change, 1 The New Advocate 42 (1988).

[152] See L. Kohlberg, The Philosophy of Moral Development (1981). See also S. Lightfoot, The Good High School: Portraits of Character and Culture 174-83 (1983) (describing initiation of "just community" program in a surburban Boston high school).

would be a wise legislative decision to allocate funds to these programs. In that manner, legislators can react to nationwide concern over the public schools by supporting educator initiatives that improve education for all students rather than "at-risk" programs that concentrate their efforts on, and thus stigmatize, a special group of students. Our schools are at risk, and until we improve school structures and programs, our students will suffer the effects of institutions designed as factories to produce uniform products in the form of educated citizens instead of benefitting from learning environments recognizing and supporting difference.